1992

# State of Utah v. Don W. Dunbar : Brief of Appellant

Utah Court of Appeals


George W. Preston; Attorney for Appellee.
Ted S. Perry; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff-Appellee ) Case No. 920341-CA

vs.

DON W. DUNBAR ) Priority No. 2

Defendant-Appellant

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# BRIEF OF APPELLANT

DEFENDANT'S APPEAL OF JUDGMENT ENTERED BY THE FIRST CIRCUIT COURT OF CACHE COUNTY, UTAH, THE HONORABLE ROGER S. DUTSON, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

## OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellee ) Case No. 920341-CA

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DON W. DUNBAR, Priority No. 2

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# BRIEF OF APPELLANT

## JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a judgment of the Circuit Court of the First Judicial District of the State of Utah in and for the County of Cache, Honorable Roger S. Dutson, presiding, dated May 8, 1992 finding the defendant guilty of driving on suspension, a Class C Misdemeanor. The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(d) and (f) Utah Code Ann. 1953, as amended. This appeal is taken by the defendant under Article I, Section 12 of the Utah Constitution, Sections 77-1-6(g) and 78-4-11, Utah Code Ann. 1953, as amended, and pursuant to Rule 26(2)(a) of the Utah Rules of Criminal Procedure.

## ISSUES PRESENTED ON APPEAL

## AND STANDARDS OF APPELLATE REVIEW

1. The trial court erred by not granting the motion to dismiss for lack of a speedy trial. The issue is a question of law and the Standard of Review is a "correction of error" standard. [See State v. Johnson, 771 P 2d 326 (Utah App. 1989).]

2. The trial court erred by not granting the motion to dismiss for denial of equal protection and due process. The issue is a question of law and the Standard of Review is a "correction of error" standard. (See State v. Johnson, supra.)

3. Where a traffic offense occurs partly in a jurisdiction that has a justice court and it is a Class C Misdemeanor, a Circuit Court has no jurisdiction. The Standard of Review is "de novo" where the question is whether the trial court had jurisdiction as a matter of law. [See Barlow v. Cappo, 821 P 2d 465, (Utah App. 1991).]

4. The trial court erred by not requiring the clerk to draw the jury panel by lot instead of seating the panel in alphabetical order. The Standard of Review is a "correction of error" standard. (See State v. Johnson, supra.)

5. Where the prospective jurors were not willing to give the defendant the presumption of innocence if he chose not to testify the entire panel should have been discharged. The Standard of Review is a "correction of error" standard. (See State v. Johnson, supra.)

6. The trial court erred by not declaring a mistrial when

the prosecution introduced evidence that part of the alleged driving took place in River Heights where the court had previously instructed the prosecution that such evidence would not be admitted. The Standard of Review is whether the admission of such evidence affected a substantial right of the party. [See State v. Morgan, 813 P. 2d 1207 (Utah App. 1991).]

7. The trial court erred by not granting a motion for a directed verdict where the evidence showed the defendant's license had expired one and one half years before the alleged charge of driving on suspension. The Standard of Review is a "correction of error" standard. (See State v. Johnson, supra.)

8. The trial court erred by not permitting the jury to consider a lesser included offense of driving without a license. A refusal to give a jury instruction is a question of law only and no particular deference is granted to the trial court. [See State v. Pedersen, 802 P 2d 1328 (Utah App. 1990).]

9. The trial court erred in not granting a mistrial where the prosecuting attorney and the state's only witness discussed the case in the presence of the jury foreman. The Standard of Review is an abuse of discretion determination. [See Logan City v. Carlsen, 799 P. 2d 224 (Utah App. 1991).]

10. The trial court erred by not granting a motion for a directed verdict where the evidence did not show the defendant was given notice of suspension or that he was the same person named in the driving records. The Standard of Review is whether the evidence

viewed in a light most favorable to the jury verdict is sufficient to support the jury verdict. [See State v. Singer, 815 P 2d 1303 (Utah App. 1991).

11. The trial court erred by not sua sponte requiring another bailiff to attend the proceedings on April 3, 1992 and April 24, 1992 where the information showed the bailiff was the only witness for the state in this case. The Standard of Review is an abuse of discretion determination. (See Logan City v. Carlsen, supra.)

12. The trial court erred by not ruling upon the state's motion to amend the information made on April 3, 1992 to change the date of the offense to May 16, 1991 as with the motion pending the defendant could not present evidence of an alibi nor could the defendant exercise his right to testify in his own behalf without knowing with certainty the date of the alleged offense. The Standard of Review is a "correction of error" standard. (See State v. Johnson, supra.)

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Issue No. 1:

a. Amendment VI of the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

b. Article I, Section 12 of the Utah Constitution reads as follows:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

c. Section 77-1-6 (1)(f) Utah Code Ann. 1953, reads as follows:

> In criminal prosecutions the defendant is entitled . . To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

d. Rule 25(b)(1) of the Utah Rules of Criminal Procedure reads as follows:

> The court shall dismiss the information or indictment when: (1) There is unreasonable or unconstitutional delay in bringing defendant to trial.

Issue No. 2:

a. Amendment XIV of the United States Constitution reads in part as follows:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Article I, Sections 7 and 24 of the Utah Constitution read as follows:

> No person shall be deprived of life, liberty or property, without due process of law.

All laws of a general nature shall have uniform operation.

c. Section 41-6-167 Utah Code Ann. 1953 reads as follows:

(a) Upon any violation of this act punishable as a misdemeanor, whenever a person is (not) immediately taken before a magistrate as hereinbefore provided, the police officer shall prepare in triplicate or more copies a written notice to appear in court containing the name and address of such person, the number, if any, of his operator's license, the registration number of his vehicle, the offense charged, and the time and place when and where such person shall appear in court.

(b) The time specified in said notice to appear must be at least five days after such arrest unless the person arrested shall demand an earlier hearing.

(c) The place specified in said notice to appear must be made before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense.

(d) The arrested person, in order to secure release as provided in this section, must give his written promise satisfactory to the arresting officer so to appear in court by signing at least one copy of the written notice prepared by the arresting officer. The officer shall deliver a copy of such notice to the person promising to appear. Thereupon, said officer shall forthwith release the person arrested from custody.

(e) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and shall be subject to removal from office.

d. Section 41-6-169 Utah Code Ann. 1953 reads as follows:

The foregoing provisions of this act shall govern all police officers in making arrests without warrant for violations of this act, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade.

e. Rule 6(a) Utah Rules of Criminal Procedure reads in part as follows:

. . Upon the filing of an information, if it appears from the information, or from any affidavit filed with the information,

that there is probable cause to believe that an offense has been committed and that the accused has commited it, the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused.

Issue No. 3:

a. Sections 77-7-19(4)(a) and (b), 77-25-1, 78-4-5 and 78-5-104, Utah Code Ann. 1953, read as follows:

77-7-19(4)(a) Except where otherwise provided by law, a citation or information issued for violations of Title 41 shall state that the person receiving the citation or information shall appear before the magistrate who has jurisdiction over the offense charged.

(b) If the citation or information is issued for an offense under the jurisdiction of the justice courts and occurs within the geographical boundaries of any municipality or county precinct where a justice court exists and a justice court judge is currently serving, that court is the magistrate before whom the person shall appear.

77-25-1 The jurisdiction of justice courts, except as otherwise provided by law, shall extend to the limits of the county in which the justice court is located.

78-4-5 Circuit courts have jurisdiction over Class A Misdemeanors. Circuit courts have jurisdiction over class B misdemeanors classified by Title 41, Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving, ordinances that comply with the requirements of Section 41-6-43, and class B misdemeanors classified by any title other than Title 41. Circuit courts have jurisdiction over all related misdemeanors arising out of a single criminal episode. When a justice court is given jurisdiction of a criminal matter and there is no justice court with territorial jurisdiction, the circuit court shall have jurisdiction. The circuit court shall retain jurisdiction over cases properly filed in the circuit court prior to January 1, 1992. The circuit court shall have jurisdiction as provided in Section 10-3-923.

[78-4-5 in effect on June 3, 1991 provides in part as follows: (1)(c) All complaints for offenses charged under Title 41 except offenses charged under Article 5, Chapter 6, Title 41, shall be filed in the municipal justice court or the county justice court where the offense occurred if those justice courts exist and have jurisdiction of the offenses.

78-5-104 (1) Justice courts have jurisdiction over class B and C misdemeanors, violations of ordinances, and infractions committed within their territorial jurisdiciton, except those offenses over which the juvenile court has exclusive jurisdiction.

[On June 3,1991 78-5-104 provided in part as follows: (2)(a) Municipal justice courts have exclusive original jurisdiction over the following offense committed within the territorial jurisdiction of the court: (i) all city or town ordinances; and (ii) offenses charged under Title 41 except driving under the influence of alcohol or drugs, driving with a blood alcohol content of .08% or higher, and reckless driving.

b. Rule 7(2) Utah Rules of Criminal Procedure provides as follows:

When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to a magistrate under Section 77-7-19. If a magistrate is not available in the circuit or precinct, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense.

c. Rule 5(e) and 81 (e) of the Utah Rules of Civil Procedure provide as follows:

(5)(e) The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk, if any.

(81)(e) These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

Issue No. 4:

a. Rule 18(a) of the Utah Rules of Criminal Procedure provides as follows:

The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as

will allow for all peremptory challenges permitted. . . When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

Issue No. 5:

a. Rule 18(e)(14) of the Utah Rules of Criminal Procedure provides as follows:

(the challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds: (14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion act impartially and fairly upon the matter to be submitted to him.

Issue No. 6:

a. Rule 611 (a) Utah Rules of Evidence provides as follows:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Issue Nos. 7 and 8:

a. Sections 41-2-102(25), 41-2-104, 41-2-136, 41-12a-412 read as follows:

41-2-102(25) [In effect in May 1991 (now appears as subsection 27)] "Suspension" means the temporary withdrawal by action of the division of a licensee's privilege to operate a motor vehicle.

41-2-104(1) No person except one expressly exempted under Section 41-2-107, 41-2-108, or 41-2-111, or Subsection 41-2-121(4), or Chapter 22, Title 41, may operate a motor vehicle on a highway in this state unless the person is licensed as an operator by the division under this chapter.

41-2-136(1) and (2) A person whose license has been denied, suspended, disqualified, or revoked under this chapter and operates any motor vehicle upon the highways of this state while that license is denied, suspended, disqualified, or revoked shall be punished as provided in this section.

A person convicted of a violation of Subsection (1), other than a violation specified in Subsection (3), is guilty of a Class C Misdemeanor.

41-12a-412(1) No motor vehicle may be registered in the name of any person required to file proof of owner's security unless proof of that security is furnished for the motor vehicle.

(2) Whenever the department lawfully suspends or revokes the driver's license of any person upon receiving record of a conviction or a forfeiture of bail, the department shall also suspend the registration for all motor vehicles registered in the name of the person. However, the department may not suspend the person's motor vehicle registration, unless otherwise required by law, if the person has given or immediately gives and then maintains proof of owner's security for all motor vehicles registered by the person.

(3) Licenses and registrations suspended or revoked under this section may not be renewed, nor may any driver's license thereafter be issued, nor may any motor vehicle be thereafter registered in the name of the person until he gives and thereafter maintains proof of owner's security.

(4) If a person is not licensed, but by final order or judgment is convicted or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring suspension or revocation of license, or for operating an unregistered motor vehicle upon the highways, no license may may thereafter be issued to the person and no motor vehicle may continue to be registered in his name until he gives and thereafter maintains proof of owner's security.

(5) Whenever the department suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, this privilege remains suspended or revoked unless the person has given or immediately gives and thereafter maintains proof of owner's security.

Issue No. 9:

a. Rule 18(a) Utah Rules of Criminal Procedure reads as follows:

The clerk shall draw by lot and call the number of the jurors that are to try the case plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its preemptory challenge to one juror at a time in regular turn, as the court may direct, until all preemptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

Issue No. 10:

a. Section 76-2-101 Utah Code Ann. 1953 reads as follows:

No person is guilty of an offense unless his conduct is prohibited by law and:

(1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or

(2) His acts constitute an offense involving strict liability.

These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.

b. Section 76-2-102 Utah Code Ann. 1953 reads as follows:

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

## STATEMENT OF THE CASE

An Information was filed on June 6, 1991 charging the defendant with Driving on Suspension, a Class C Misdemeanor, and summons was served on the defendant on June 3, 1991 just prior to his entrance in Court on another case. (R. 183-5) (T-3 6-7) [Reference to April 3, 1992 transcript will be T-3, April 24, 1992 T-24, and May 8, 1992 T-8.] On January 31 1992 defendant was arraigned and an attorney was appointed on February 4, 1992 (R 171, 175), and after some preliminary motions the defendant was tried by a jury on May 8, 1992 and found guilty and was sentenced to 30 days in jail to be suspended upon payment of a fine of $150.00. (R 21)

## STATEMENT OF FACTS

On June 3, 1991 James Meacham, the bailiff in Judge Roger S. Dutson's court in the Circuit Court of the First Judicial District, State of Utah, in and for the County of Cache (T-3 5-6), went before the Honorable Clint Judkins, another judge in the First Circuit, and swore to an information charging the defendant with the crime of Driving on Suspension, a Class C Misdemeanor (R 186), alleged to have occurred on May 17, 1991 in Cache County, Utah. Just prior to a hearing on another matter in First Circuit Court set for 4 p.m. on June 3, 1991 in Judge Dutson's court room the defendant was served with a summons requiring him to appear on the first Tuesday after service which would be the next day, June 4, 1991 (R 183-185). It is not clear who served the summons as the summons shows it was served

by D. R. Meacham (R. 185), another deputy Cache County Sheriff, but James Meacham testified that he served the summons (T-3 6, T-8 68).

No citation had ever been given to the defendant and officer Meacham testified when he claimed to have seen the defendant driving he did not stop him (T-8 64). Officer Meacham also testified that on or about the same time he claimed to have seen another person whom he thought was driving on suspension and he did not stop him either and give him a citation, but he did place him under arrest about ten minutes after he claims to have seen him driving (T-8 64).

Even though James Meacham was the bailiff in Judge Dutson's court room in First Circuit Court, he did not inform Judge Dutson that he had just served the defendant the summons in this matter even though the defendant was present in court and appearing before Judge Dutson on another matter (T-3 7).

There is no notation on the information as required by Rule 5(e) Utah Rules of Civil Procedure (made applicable to criminal procedure by Rule 81(e) Utah Rules of Civil Procedure) so it is apparent that Judge Judkins did not permit the filing of the information with him (R. 186). The information was not in fact filed with the clerk of the court until June 6, 1991 at 11:08 a.m. or two days after the date the defendant was supposed to appear and answer to the Information (R. 186).

On January 31, 1992 the defendant was arrested on another

matter and for the first time learned that an Information had been filed on June 6, 1991 or two days after he was supposed to appear (R. 172-3).

Even though the defendant was indigent he was ordered to plead without being furnished counsel and counsel was not appointed until February 4, 1992 (R. 171).

On February 7, 1992 the court appointed counsel moved to dismiss under the United States and Utah Constitutions for failure to grant a speedy trial and because of denial of equal protection and due process (R. 147 ). At the hearing on this motion James Meacham testified the alleged driving took place on Thursday (which would be May 16, 1991) and the state moved to amend the information. (T-3 12) The court did not rule on the state's motion, but took it under advisement and denied the defendant's motions on April 3, 1992. (T-3 28)

Through discovery the defendant learned that most of the alleged driving took place in River Heights, Utah and on March 31, 1992 the defendant moved to dismiss because the Circuit Court did not have jurisdiction over a Class C Misdemeanor traffic offense (R.115-118). This motion was denied by the trial court on April 24, 1992 (T-24 9)

A jury trial was set for May 8, 1992. The Clerk did not draw the names of the prospective jurors by lot as required by Rule 18(a) of the Utah Rules of Criminal Procedure, but the 15 jurors summoned were seated in aphabetical order (T-8 2, R. 36).

During the examination of the 15 jurors defendant's counsel asked the jurors if they would give the defendant the presumption of innocence (T-8 27-8). Many jurors indicated they would not so the Court explained the rule regarding presumption of innocence and defendant's counsel asked the panel if the defendant does not take the witness stand "do any of you feel . . if . . a juror was in your present frame of mind you would want that person to sit on a jury" (T-8 33). Only juror Linda Price answered in the affirmative (T-8 34) and she was removed by the State's second peremptory (R 36). Defendant's motion to discharge the entire panel was not recorded so it was renewed to clarify the record (T-8 34, 98). The court denied the motion off the record.

Counsel for the defendant did not accept the jury but the Court ordered counsel to select the jury by exercising their peremptory challenges from the panel as seated in alphabetical order and not as drawn by lot (T-8 2) (R 36).

During the trial even though the Court had previously ruled there could be no evidence presented of driving in River Heights (T-24 5, 8-11) counsel for the plaintiff elicited this information from the only witness by asking the officer how far he had followed the defendant after he first observed him at Third South and Main and he answered "mile and a half to two miles" which placed the defendant in River Heights for most of the driving (T-8 56).

State introduced Exhibit "1" (R 76) the driving record of one Don W. Dunbar, but no evidence was presented that this was the same

Don W. Dunbar as was being tried (T-8 80, 81).

Exhibit "1" also showed that this Don W. Dunbar's license had expired on December 18, 1989 (one and one half years before being charged with driving on suspension). The defendant moved to dismiss on the grounds that the proper offense was driving without a license under Section 41-2-104 Utah Code Ann. 1953, as amended, since the license had expired and could no longer be suspended and for the State's failure to show that the defendant had been given notice of suspension. (Both motions were denied.) (T-8 75-81.)

The defendant also requested an instruction that the jury could find the defendant guilty of driving without a license, a lesser offense of an infraction, but this was also denied. (T-8 91-93.)

During the trial the prosecuting attorney informed the Court that in the presence of a juror (Don Corbridge) who later became the foreman he had discussed the case with the only witness, James Meacham, in the court house lobby. The Court quizzed the juror, but all the juror could remember is that "I remember hearing Mr. Perry's name" but he could not recall anything else. The defendant moved for a mistrial which was denied (T-8 81-85).

This overheard conversation takes on additional significance because of the affidavit attached to the motion for a certificate of probable cause as it appears the juror had an adverse interest to the defendant's attorney and may not have been unbiased (R 8-9).

The defendant did not testify (T-8 93).

The jury found the defendant guilty of driving on suspension

and the defendant was sentenced to pay a fine of $150 and serve 30 days in the Cache County Jail with the days in jail suspended upon payment of the fine. (R. 21)

## SUMMARY OF ARGUMENT

A speedy trial is said to be a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays. The failure of the State of Utah to file the Information before issuing a summons, the failure to arraign the defendant on the information when he was present in court or to notify him of a date certain in which he was to appear and thus allowing almost eight months to elapse before the defendant knew he would need an alibi defense to defend himself all compel the conclusion that under the eight factors listed by the appellate courts the defendant was denied a speedy trial.

Equal protection and due process demand that the defendant be treated the same as all persons charged with an offense. The failure to issue a citation to the defendant when the officer claims to have observed him driving or in the alternative to place him under arrest, and the failure to file an information before issuing a summons, and the failure to permit him to be arraigned on an information sworn to but purposely not filed until after the defendant had left the court on another matter all tend to show the defendant was not treated the same as other persons charged with traffic misdemeanors.

Sections 77-7-19(4)(b) and 78-4-5 Utah Code Ann. 1953, as amended, in effect in May 1991 require the offense to be filed in the justice court having jurisdiction where one was in existence at the time of offense and the offense occurred within its jurisdiction. Section 78-4-5, Utah Code Ann. 1953, as amended, in effect when the defendant made his first appearance in January 1992 divests the Circuit Court of jurisdiction where the case was not properly filed in May or June 1991.

Rule 18(a) of the Utah Rules of Criminal Procedure clearly requires the jurors to be drawn by lot and not arranged in alphabetical order as was done by the trial court.

The defendant is entitled to be tried by an impartial jury and where all the jurors but one refused to give him the presumption of innocence and felt in their own minds they would not like a juror in their frame of mind to try them if they were the defendant and especially where it subsequently appeared that one juror could have possibly been prejudiced against the defendant's attorney, the entire panel should have been discharged and a new panel selected.

Under its authority in Rule 611 (a) of the Rules of Evidence the Court should enforce its orders made in pre-trial conference by declaring a mistrial when the prosecution violates the rule, especially where the defendant has given a notice of alibi and allowing the additional evidence may have interferred with the election to testify.

As written the laws of the State of Utah should not be inter-

preted as continuing the period of suspension after a driver's license has expired by its terms.

Where the facts before the Court can be interpreted by the jury in one of two ways, either that the defendant's license has been suspended or that it has expired, the defendant is entitled to an instruction setting forth his theory of the offense which would be an infraction instead of a misdemeanor.

Since it is not possible to read a juror's mind, where he has been exposed to a conversation between the prosecuting attorney and the only witness in the case in which the case was discussed, there should be a mistrial to assure that the defendant receives a fair trial especially where it subsequently is shown that the juror exposed to the conversation may have been prejudiced.

The defendant had to have knowledge that his license had been suspended before he should be found guilty of violating the law prohibiting driving while his license is suspended.

While there is no rule against allowing a court bailiff to testify, the close relationship between a bailiff and a judge should compel the judge to employ another bailiff where the bailiff is the only witness in order to maintain the appearance of fairness.

Even though it is true that the rules allow an information to be amended at almost anytime during the trial, where the state of Utah has made a motion to amend, the Court should rule upon the same prior to the beginning of the trial especially where the defendant has given a notice that he intends to present evidence of an alibi

as the date of the offense became critical to the case under such circumstances.

## ARGUMENT

POINT ONE: THE TRIAL COURT ERRED BY NOT GRANTING THE DEFENDANT'S MOTION TO DISMISS FOR LACK OF A SPEEDY TRIAL.

The Utah Supreme Court and the United States Supreme Court have stated that the right to a speedy trial is fact sensitive (see State v. Weddle, 29 Utah 2d 145, 506 P. 2d 67 [1973], Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed 2d 101 [1972] and see also State v. Hoyt, 806 P. 2d 204 [Utah App. 1991]). In those cases eight factors are listed to be considered by the Court in determining whether or not the defendant has been denied his right to a speedy trial: (1) which party caused it; (2) whether it may have been willful and/or for some improper purpose; (3) whether the defendant was aware of his rights; (4) whether he made known his desire for a speedy trial; (5) whether by words or conduct there was explicit or implicit waiver; (6) whether the proceeding was completed as soon as reasonably could be done in the circumstances; (7) the length of delay; and (8) any prejudice to the defendant.

1. Which party caused the delay. The record is clear that the State of Utah caused the delay in this matter. Officer Meacham claims to have seen the defendant driving a motorcycle on May 16 or May 17, 1991 at a time when he suspected his driver's license

had been suspended (T-3 4). He did not give him a citation nor did he arrest him (T-3 5 ). The defendant was scheduled to be in Circuit Court on another matter on June 3, 1991 at 4 p.m. (T-8 65) Just prior to 4 p.m. on June 3, 1991 Officer Meacham went before Judge Judkins (another Judge in the Circuit Court) and swore to the information in this case (R. 186). The information was not filed at that time but was held for three days and then filed at 11:08 a.m. on June 6, 1991 (R. 186). Nevertheless, Officer Meacham obtained a summons and served it or had it served on the defendant just prior to the hearing at 4 p.m. on June 3, 1991 (T-3 6,7). Officer Meacham did not tell the Circuit Judge who was handling the defendant's case on June 3, 1991 at 4 p.m. that he had just signed an information even though he was the bailiff in that case (T-3 7). (See also T-8 65-66.)

The defendant was not asked to plead to the new information on June 3, 1991 when he was in court, nor was there an information on file on June 4, 1991, which was the first Tuesday after being served with a summons, to which he could have plead. The State of Utah further compounded the problem by not showing the address of the defendant on the return of service of summons as required by Utah Rules of Civil Procedure, Rule 4(h)(1) made applicable to the Utah Rules of Criminal Procedure by Rule 81(e) of the Utah Rules of Civil Procedure. The Clerk was thus left without any information as to the correct address of the defendant to which notice could have been given after the information was

filed and the four random addresses chosen were not successful. Even though officer Meacham testified he had seen the defendant a number of times in Logan (T-8 51), no effort was made to bring the defendant before the Court until he was arrested on another matter and brought before the Court on January 31, 1992 (R. 172).

2. Was the delay willful or for some improper purpose. It is, of course, impossible to read the mind of law enforcement officers, but it is respectfully submitted it does seem strange that even though officer Meacham claims to have seen the defendant on May 16 or 17, 1991 he did not issue him a citation nor place him under arrest. He does not file an information until he finds the defendant is appearing on another case where he is the bailiff, but then even after swearing to the information just prior to the hearing at 4 p.m. on June 3, 1991 he does not file it until three days pass (R. 186), he obtains a summons without filing the information or providing the judge with a probable cause statement as required by Rule 6(a) of the Utah Rules of Criminal Procedure, he serves or has the summons served just prior to the hearing but does not tell the judge that he has just sworn to an information, he does not obtain the current address of the defendant when the summons is served so that the clerk of the court can send a notice to the correct address, and then even though he testifies he sees the defendant around Logan from time to time (T-8 51)he makes no effort to have the defendant served with a warrant of arrest until the defendant appears on another matter. All this time he knows that if the defendant appeared

on the first Tuesday after service of the summons, which would have been June 4, 1991, there would be no information on file because it was not filed with the clerk of the court until June 6, 1991 at 11:08 a.m. Certainly the facts indicate the delay was either willful or for some improper purpose.

3. Whether the defendant was aware of his rights. There is nothing in the record that indicates the defendant was ever advised of his right to a speedy trial until his court appointed attorney filed a motion in the trial court on February 7, 1992 or nearly nine months after the officer claims to have seen the defendant driving on May 16 or 17, 1991.

4. Whether the defendant made known his desire for a speedy trial. Since the defendant was not arraigned on June 3, 1991 when the officer should have brought the new information to the Court's attention and since there was no information on file on June 4, 1991 when the defendant was supposed to appear it was impossible for the defendant to ever make a demand for a speedy trial until his counsel was appointed in February 1992.

5. Whether the defendant used words or conduct to indicate he waived the right to a speedy trial. Except for the admission by the defendant's attorney that the defendant did not voluntarily appear on another matter there is nothing in the record that the defendant used words or conduct to indicate a waiver of a speedy trial until the defendant filed his motion to dismiss at which time he waived the right to a speedy trial until the court determined

the motion filed on February 7, 1992.

6. Whether the proceedings were completed as soon as reasonably could be done in the circumstances. It is obvious that if the officer had issued a citation or placed the defendant under arrest when he claimed to have seen him driving on May 16 or 17, 1991 the proceedings could have been completed in a short time. It is obvious that if the officer after swearing to an information on June 3, 1991 just prior to the defendant's appearance in Court on another matter had brought the information to the Court's attention the proceedings could have been completed in a short time. It is obvious that if the information had been filed before the summons was issued as required by law (see Rule 6(a) Utah Rules of Criminal Procedure), if the defendant had failed to appear on June 4, 1991 as required by the summons a warrant could have been issued and matter completed in a short time. It is obvious that if the officer had placed the defendant's current address on the return of the service of summons (as required by Rule 4(h)(1) Utah Rules of Civil Procedure) the proceedings could have been completed in a short time. But the failure of the officer to follow the required procedures caused a delay of nearly nine months before the defendant even knew of his right to a speedy trial.

7. The length of the delay. While it is true that in State v. Trafny, 799 P 2d 704 (Utah 1990) the Utah Supreme Court allows delays of from 3½ months to 12 months, all of these delays were contributed to by the defendant. The defendant cannot be charged

with any delay in this case.

8. Any prejudice to the defendant. This is not a serious offense. The officer was confused at the hearing on April 3, 1992 as to whether the defendant had been driving on May 16 or May 17, 1991 (T-3 4-5). The defendant filed a notice of alibi thinking that the offense took place on May 16, 1991 as the state had moved to amend the information (T-3 p.12), but because the defendant had no memory of what had happened on May 17, 1991 (nearly a year later) he was reluctant to take the witness stand. Our whole judicial system is built on fairness. Where the officer with his notes in front of him cannot remember nearly a year later when the alleged driving took place (T-3 5), we should not expect the defendant to remember what he was doing at that time. Certainly the defendant has been prejudiced in his defense by the action of the state in keeping this case hid for nearly nine months before the defendant is required to plead.

All of the essential elements which the Courts have used to evaluate whether or not the defendant has been denied the right to a speedy trial being in the defendant's favor, it is respectfully submitted that the trial court should have granted the defendant's motion to dismiss the information for failure to provide the defendant with a speedy trial under Article I, Section 12 of the Utah Constitution and Amendment VI of the United States Constitution.

POINT TWO: THE TRIAL COURT ERRED BY NOT GRANTING THE MOTION TO DISMISS FOR DENIAL OF EQUAL PROTECTION AND DUE PROCESS.

The law is well settled that a State may not treat its citizens differently when bringing a criminal action. Amendment XIV of the United States Constitution and Section 24, Article I, of the Utah Constitution requires that all persons similarly situated must be treated alike. To single out the defendant as the only person who is charged with a violation of the driver's license provisions where the officer had reasonable suspicion to believe that the defendant did not have a valid driver's license (T-3 4); he claims to have seen the defendant driving on the highways of this state (T-3 4, 5) but did not as required by law either stop him and issue a citation to him or arrest him and take him before a magistrate (T-3 5), but some two and one-half weeks later swear to an information before a magistrate (R. 186), obtain a summons from the magistrate (without first filing the information as required by Rule 6[a] Utah Rules of Criminal Procedure), cause it to be served on a Monday where the Summons required the defendant to appear on the First Tuesday after Service and then fail to file the Information with the clerk of the court until two days after the defendant was supposed to appear (R. 186), after serving the summons fail to inform the court before whom the defendant was appearing and where the same officer was the bailiff (R. 183) fail to inform the court that he had just sworn to an information (T-3 7), and where the officer serving the summons failed to note the place where the

defendant was served is to treat the defendant differently than all other persons are treated in similar situations in the State of Utah.

In Eubanks v. Louisiana, 356 U. S. 584, 2 L ed 2d 991, 78 S. Ct. 970, the United States Supreme Court said: "But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty."

Section 41-6-167, Utah Code Ann. 1953 is clear. It provides that "Upon any violation of this act (the Motor Vehicle Act under which the defendant is charged) punishable as a misdemeanor (the defendant was charged with a Class C Misdemeanor), whenever a person is (the word "not" should be inserted in the Code as it was inadvertantly omitted when the law was changed from the 1943 compilation of the Utah Code and Section 57-7-227, Utah Code Ann. 1943 includes the word "not" at this point) immediately taken before a magistrate as hereinbefore provided, the police officer shall prepare in triplicate or more copies a written notice to appear in court containing the name and address of such person . ." Upon claiming to have seen the defendant driving without a license on May 16 or May 17, 1991, the officer did not issue him a citation nor did he take him before a magistrate (T-3 5, 6).

Section 41-6-169 Utah Code Ann. 1953 allows an alternative procedure where the officer does not arrest the alleged offender or issue him a citation as provided in Section 41-6-167, supra. In this section of the code the legislature has authorized the arrest and prosecution in any other way provided by law. The legislature did not authorize the State of Utah to proceed by summons where the officer failed to comply with Section 41-6-167, supra. Had the officer asked the magistrate for a warrant of arrest he would have had to make an affidavit showing there is probable cause for the arrest (see Giordenello v. United States of America, 357 U. S. 480, 2 L ed 2d 1503, 78 S. Ct. 1245 (1958) holding that mere recital of facts on a complaint is not sufficient for issuance of a warrant, but a neutral magistrate must determine probable cause).

Indeed Rule 6(a) of the Utah Rules of Criminal Procedure expressly requires the magistrate to determine there is probable cause before issuing either a warrant or a summons. In this case all the magistrate had before him was a conclusion of law sworn to on information and belief by the officer which did not allege any facts that the officer had personally witnessed the defendant driving or that the officer had knowledge from a particular source that the defendant's driver's license had been suspended. (See 5 Am Jur 2d Arrest Section 13 p. 706 and Section 14 p. 707 expressly stating that "an affidavit that merely states belief in the guilt of the accused is insufficient to support a warrant of arrest . ")

It is clear that the State of Utah failed to follow its own

procedures where the officer did not either issue the defendant a citation, or make an arrest without a warrant, or make an affidavit which established probable cause for issuance of a warrant or summons.

Had the officer issued a citation or arrested the defendant when he claimed to have observed him on May 16 or 17, 1991 there would have been no question as to the date of the offense and probably no question as to whether or not the defendant was driving. Had the officer made an affidavit setting forth facts which justified the issuance of a warrant of arrest at the time he erroneously requested a summons, there would have been no doubt as to the date of the alleged offense and the affidavit would have been on file with the information for the defendant to examine at the time he was served with summons on June 3, 1991 and perhaps he could have remembered at that time where he was on May 16 or May 17, 1991. But permitting the State of Utah to disregard its procedures as was done in this case seriously interferes with the defendant's ability to defend himself and may result in an innocent person being punished for a crime which our system is intended to prevent.

The Information should have been dismissed for failure to give the defendant equal protection of the laws.

The procedure in this case disregarded the law in so many respects that the information should have been dismissed as the defendant was denied due process of law. (See Chambers v. Mississippi, 410 U S 284, 93 S. Ct. 1038, 35 L ed 2d 297 (1973) where the Court said: "The right of an accused in a criminal trial to due process is, in

essence, the right to a fair opportunity to defend against the State's accusations."

POINT THREE: WHERE A TRAFFIC OFFENSE OCCURS PARTLY IN A JURISDICTION THAT HAS A JUSTICE COURT AND IT IS A CLASS C MISDEMEANOR, A CIRCUIT COURT HAS NO JURISDICTION.

It is clear that Section 78-4-5 Utah Code Ann. 1953 in effect on January 1, 1992 gives Circuit Courts jurisdiction over Class C Traffic Offenses only where the case was properly filed prior to January 1, 1992. The facts in this case show the case was not properly filed prior to January 1, 1992.

It is clear that officer Meacham testified that he observed the defendant driving a few blocks in Logan (T-3, 8) and then about a mile and a half in River Heights (T-8 56).

The laws of the State of Utah are silent with respect to a traffic offense over which a justice court has jurisdiction where it occurs partly in the geograpical boundaries of a muncipality where a justice court exists and partly within the geographical boundaries of a municipality where no justice court exists, but Sections 78-4-5 Utah Code Ann. in effect on June 3, 1991 when the information was signed and Section 77-7-19(4)(b) Utah Code Ann. 1953, as amended, are clear that if the offense occurs within the geographical boundaries of a municipality where a justice court exists that justice court is the magistrate before whom the person should appear.

Since the legislature has chosen not to make any exception to that rule, different interpretation would permit judge shopping

frowned upon by the Utah Supreme Court in Wells v. Logan City Court, 535 P. 2d 683 (1975), Hillyard v. Logan City Court, 578 P 2d. 1270 (1978), and Woytko v. Browning, 659 P 2d 1058 (1983). But in Mr. Dunbar's case now before this court the problem is clearly one of jurisdiction and not one of venue and the legislature has chosen to give the municipal justice courts jurisdiction without exception if the offense occurs within their geographical limits.

It is also clear that the information in this case can hardly be said to have been properly filed where a summons may not be issued before it is filed (see Rule 6(a) Utah Rules of Criminal Procedure) but a summons was issued and the information was not filed until three days after the issuance of the summons, the information was not filed with the circuit court judge as permitted by Rule 5(e) of the Utah Rules of Civil Procedure, nor was the information filed without delay contrary to the intent of Rule 7(2) of the Utah Rules of Criminal Procedure.

Since the Circuit Court did not have jurisdiction the matter should be remanded for a new trial in the River Heights Municipal Justice Court.

POINT FOUR: THE TRIAL COURT ERRED BY NOT REQUIRING THE CLERK TO DRAW THE JURY PANEL BY LOT INSTEAD OF SEATING THE PANEL IN ALPHABETICAL ORDER.

Contrary to the express provisions of Rule 18(a) of the Utah Rules of Criminal Procedure which requires that the clerk of the court "draw by lot" the number of the jurors to try the cause plus

such additional number as will allow for all peremptory challenges permitted, the Court ordered all fifteen prospective jurors to be seated in alphabetical order (only ten names should have been drawn as only four jurors are required for Class C Misdemeanors [Section 78-46-5(3) Utah Code Ann. 1953] and each side is allowed three peremptory challenges [Rule 18(d) Utah Rules of Criminal Procedure].) After each side had asked the jurors questions the jurors were allowed to remain seated in alphabetical order and the parties had to exercise their peremptory challenges based on the selection by alphabetical order instead of having the jurors drawn by lot (T-8 2).

Clearly such a disregard for the Utah Rules of Criminal Procedure should not be allowed to go unchallenged and the matter should be remanded for a new trial with the jury selected in a proper manner. (See State v. Bates, 22 Utah 65, 61 Pac. 905 [1900].)

POINT FIVE: WHERE THE PROSPECTIVE JURORS WERE NOT WILLING TO GIVE THE DEFENDANT THE PRESUMPTION OF INNOCENCE IF HE CHOSE NOT TO TESTIFY THE ENTIRE PANEL SHOULD HAVE BEEN DISCHARGED.

Rule 18 (e) (14) of the Utah Rules of Criminal Procedure provides in part that a juror is disqualified if "a state of mind exists on the part of the juror . . which will prevent him from acting impartially and without prejudice to the substantial rights of the party . ." During voir dire counsel for the defendant asked the following:

I can't read your minds, just like the prosecutor, but I'd

> like to know, knowing what the Court's instructed you about the law about . . the defendant having the presumption of innocence, the State having to prove his guilt beyond a reasonable doubt, and he doesn't have to take the witness stand unless we decided we want to put him on the witness stand; do any of you feel that if you were the defendant sitting here, and a juror was in your present frame of mind, you would want that person to sit on a jury?
>
> If you think that you have that frame of mind that you'd be willing to be in the position of the defendant under these conditions, would you please raise your hand?

The record showed that Mrs. Price was the only juror to raise her hand (T-8 34).

The defendant's challenge to the entire panel at this point is not recorded, but to avoid the possibility it was not the defendant made it matter of record that he did not accept the jury (T-8 34, 98).

If all the jurors that sat on this case would not want a juror in their present frame of mind to sit in judgment if they were the defendant, surely the Court of Appeals should find as a matter of law that the jury were not impartial as required by Rule 18 (e) (14) supra.

POINT NO. SIX: THE TRIAL COURT ERRED BY NOT DECLARING A MISTRIAL WHEN THE PROSECUTION INTRODUCED EVIDENCE THAT PART OF THE ALLEGED DRIVING TOOK PLACE IN RIVER HEIGHTS WHERE THE COURT HAD PREVIOUSLY INSTRUCTED THE PROSECUTION THAT SUCH EVIDENCE WOULD NOT BE ADMITTED.

Defendant's motion for lack of jurisdiction was denied because the trial court felt if no evidence was presented that the defendant ever drove in River Heights there would be no question as to jurisdiction. (T-24 5, 8-11). Nevertheless the plaintiff asked the witness

how far he followed the defendant knowing the answer would place the defendant in River Heights (T-8 56, T-3 7-8). This problem arises because after the testimony the defendant renewed his objection as to lack of jurisdiction because the driving took place in River Heights which has a municipal justice court (T-8 84). Since the Court had previously denied that motion solely upon the basis that the State of Utah would not introduce any evidence of driving in River Heights, the Court should have declared a mistrial or granted the defendant's motion to dismiss for lack of jurisdiction (T-24 5, 5-11). (See also T-8 47.)

POINT NO. SEVEN: THE TRIAL COURT ERRED BY NOT GRANTING THE MOTION FOR A DIRECTED VERDICT WHERE THE EVIDENCE SHOWED THE DEFENDANT'S LICENSE HAD EXPIRED ONE AND ONE HALF YEARS BEFORE THE ALLEGED CHARGE OF DRIVING ON SUSPENSION.

Even though there was no evidence that the driving records introduced as Exhibit 1 were the driving records of the defendant Don W. Dunbar, if we assume that they were his driving records they clearly show that his driver's license expired on December 18, 1989. Accordingly the defendant moved for a directed verdict because the evidence showed his driver's license had expired, it was therefore no longer suspended. (T-8 75-78)

Section 41-2-102 (25) Utah Code Ann. 1953 as amended in effect on May 17, 1991 defines "Suspension". It means "the temporary withdrawal by action of a division of a licensee's privilege to operate a motor vehicle." The legislature did not provide that the

term "suspension" included "expiration" which means "termination from lapse of time" (Black's Law Dictionary, 1979, West Publishing Co. p. 519). Some indication that the legislature did not intend to include "expiration" as part of the term "suspension" is found in Section 41-12a-412 Utah Code Ann. 1953 as amended. In sub-paragraph (3) of that Section the legislature provides that a suspended license "may not be renewed, nor may any driver's license thereafter be issued" until proof of security is maintained. So the legislature recognized that after the license had expired it was no longer suspended, but even so no new license could be issued until proof of security was maintained. In sub-paragraph (5) the legislature provides that a nonresident's operating privilege "remains suspended or revoked" until proof of security is presented. If the legislature had meant the same provision to apply to a resident it could have said so, but the legislature recognized a non-resident could obtain a new license in another state, and so it specifically extended the period of suspension of the original driver's license where a non-resident is involved.

The defendant was charged with a violation of Section 41-2-136 Utah Code Ann. 1953 as amended because his license was suspended and he drove. Since his license had expired he is not guilty of violating this section but only Section 41-2-104 Utah Code Ann. 1953 as amended as he did not have a license. A violation of this section is only an infraction (see 41-6-12(2) Utah Code Ann. 1953).

POINT NO. EIGHT: THE TRIAL COURT ERRED BY NOT PERMITTING THE JURY TO CONSIDER A LESSER INCLUDED OFFENSE OF DRIVING WITHOUT A LICENSE.

For the reasons discussed under Point No. Seven the defendant requested an instruction that the jury may find the defendant guilty of driving without a license (T-8 91-93)*which the Court denied. It is respectfully submitted that where the evidence before the Court showed that the defendant's license had expired prior to the time it was suspended, the jury as a fact finder (Section 77-17-10 Utah Code Ann. 1953 as amended) should have been entitled to consider whether or not the defendant was guilty of a lesser offense of driving without a license, an infraction.

POINT NO. NINE: THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHERE THE PROSECUTING ATTORNEY AND THE STATE'S ONLY WITNESS DISCUSSED THE CASE IN THE PRESENCE OF THE JURY FOREMAN.

During the trial a juror, Don Corbridge, admitted overhearing a conversation between the prosecutor and the state's only witness (T-8 82). He recognized the prosecutor and Mr. Meachan and heard "Mr. Perry's name" (T-8 82). After the time had expired for filing a motion for new trial it was learned that this same juror was the son of Mrs. Casper Merrill who was sueing her husband for a divorce and there was a considerable property settlement involved and Mr. Casper Merrill was represented by the firm to which the defendant's attorney belonged (R. 8-9).

The defendant moved for a mistrial because "improper contacts may influence a juror in ways he or she may not even be able to recognize" (State v. Anderson, 65 Utah 415, 237 P. 941, 943 (1925) and see Logan City v. Carlsen, 799 P2d 224 [Utah App. 1990]) (T-8 84).

*(R 58)

Even though the prosecutor had the burden of showing that the juror was not influenced the Court assumed the prosecutor's role and examined the juror (see State v. Pike, 712 P 2d 277 [Utah 1985]). Had the appropriate question of asking the juror if because Mr. Perry was involved in this case he had some reservations about his impartiality been asked it may have shown that in fact this juror was biased. In any event because of the concern raised in Point No. Five it would appear even this incidental contact with the prosecutor and the state's witness may have prevented the defendant from receiving a fair trial.

POINT NO. TEN: THE TRIAL COURT ERRED BY NOT GRANTING A MOTION FOR A DIRECTED VERDICT WHERE THE EVIDENCE DID NOT SHOW THE DEFENDANT WAS GIVEN NOTICE OF SUSPENSION OR THAT HE WAS THE SAME PERSON NAMED IN THE DRIVING RECORDS.

By stipulation the certified driving record of one Don W. Dunbar was received into evidence (T-8 58, 59). There was no stipulation that the Don W. Dunbar named in the driving record was the same Don W. Dunbar that Officer Meacham claimed to have seen driving on May 16, or May 17, 1991. There was no evidence that Mr. Dunbar ever received notice of any suspension or that he had ever lived at the address indicated on the driving records. Exhibit 1 did show that the notice mailed to the address on the driving record of the Dunbar named in the records was not delivered. Mr. Dunbar was faced with a difficult decision in this case. He could remember where he was on May 16, 1991 and when the State of

Utah moved to amend the information (T-3 12) he filed a notice to claim an alibi defense (T-24 11). But since he was not prepared to provide an alibi defense for May 17, 1991 at the time of trial it seemed the best course was to not testify since the State of Utah had failed to show that he was in fact the same Don W. Dunbar as was named of the certified copy of the driving record.

The defendant moved for a directed verdict as there was no evidence that the Don W. Dunbar named in the driving record was the same Don W. Dunbar who appeared as the defendant (T-8 80). The Court did not find there was any such evidence but simply deferred the matter for the jury to consider (T-8 81).*

Under Section 76-2-101 Utah Code Ann. 1953 as amended "No person is guilty of an offense unless his conduct is prohibited by law and: (1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute . " and this applies to offenses under Title 41 except for those offenses in Chapter 6. If there is no evidence before the Court that Don W. Dunbar the defendant was the same person as is named on the certified copy of the driving records then it seems it is impossible to find that he could act intentionally, knowingly, recklessly or with criminal negligence even though the jury may have believed he was driving on May 17, 1991. The Court of Appeals has insisted that a culpable mental state be found by the jury (see State v. Warden, 784 P 2d 1204 [Utah App. 1989] reversed State v. Warden, 813 P. 2d 1146 [Utah 1991]). It is respectfully submitted

* See Appendix

that in absence of any evidence that the two Don W. Dunbar's are the same the Court should have granted a directed verdict (see State v. Strieby, 790 P. 2d 98 [Utah App. 1990] at p. 101 " . every element of the crime charged must be proved beyond a reasonable doubt" and 75A Am Jur 2d §910-912 Trial, p. 489-490).

POINT NO. ELEVEN: THE TRIAL COURT ERRED BY NOT SUA SPONTE REQUIRING ANOTHER BAILIFF TO ATTEND THE PROCEEDINGS ON APRIL 3, 1992 AND APRIL 24, 1992 WHERE THE INFORMATION SHOWED THE BAILIFF WAS THE ONLY WITNESS FOR THE STATE IN THIS CASE.

Admittedly this issue was properly raised by the State of Utah and counsel for the defendant did not object (T-3 2). Howver the defendant Mr. Dunbar did object and as a result of the many unusual events that occurred in this entire procedure in connection with this defendant it appears that his objection may have been well taken.

The Utah Code of Judicial Conduct requires the judge to avoid the appearance of impropriety in all activities and that he should perform his duties impartially. While to the lawyer who appears before the Court day after day there seldom arises a question of concern about judicial impropriety or impartiality (see Canon 2 and 3 Utah Code of Judicial Conduct), an accused person may see things differently. That is the reason for avoiding the appearance of impropriety in all actions.

Here James Meacham was the bailiff on June 3, 1991 when the Honorable Roger Dutson sat in the First Circuit Court and the defendant Don W. Dunbar appeared in another matter (T-8 65, T-3 7).

Mr. Dunbar was served with a summons that said an information had been filed, but he was not asked to plead to the information even though he was present in Court. Nearly a year later on April 3, 1992 he comes into court believing that there is something wrong with a procedure that would hide an information for a long time (in fact not even file it until after he had appeared in court even though the summons said it had been filed) and the first person he sees is that same bailiff that served him with a summons but failed to file the information as required by law nearly a year before. Under such circumstances one can excuse the defendant for telling his attorney to object because the state's only witness in this case was the bailiff who seems to have access to the judge presiding as both enter together and leave together (T-3 3).

POINT NO. TWELVE: THE TRIAL COURT ERRED BY NOT RULING UPON THE STATE'S MOTION TO AMEND THE INFORMATION MADE ON APRIL 3, 1992 TO CHANGE THE DATE OF THE OFFENSE TO MAY 16, 1991 AS WITH THE MOTION PENDING THE DEFENDANT COULD NOT PRESENT EVIDENCE OF AN ALIBI NOR COULD THE DEFENDANT EXERCISE HIS RIGHT TO TESTIFY IN HIS OWN BEHALF WITHOUT KNOWING WITH CERTAINTY THE DATE OF THE ALLEGED OFFENSE.

At the hearing on April 3, 1992 the State of Utah moved to amend the information to state the date of the offense as May 16, 1991 (T-3 12, 21). At that hearing nor in later discovery did the State of Utah ever indicate to the defendant that it would withdraw its motion and stay with the May 17, 1991 date. Thereafter the defendant did some research and filed a notice of alibi for May 16

1991. The defendant was prepared to testify as to his doings on May 16, 1991, but felt that without further research he could not take the witness stand and testify as to May 17, 1991. His dilemma has been discussed under point no. ten. (See also T-8 68.)

Article I, Section 12 of the Utah Constitution requires the State of Utah to inform the defendant of the nature and cause of the accusation against him. Rules 4 and 16 of the Utah Rules of Criminal Procedure indicate that the defendant is entitled to know the date of the offense where it is necessary to avoid the defendant being punished twice for the same offense. Rule 1 of the Utah Rules of Criminal Procedure requires "fairness in administration." It is respectfully submitted that where the State of Utah furnishes discovery that raises some question about the date of the offense, where the officer upon reviewing his notes decides that the offense occurred on May 16, 1991 but then later changes his mind but never notifies the defendant until he testifies at the time of trial, there is no compliance with the requirements of the Utah Constitution nor is there any fairness in the administration of justice to this defendant.

In McNair v. Hayward, 666 P. 2d 321 (Utah 1983) the Utah Supreme Court said " . time is always an essential element of a crime in the sense that due process requires than accused be given sufficiently precise notification of the date of the alleged crime that he can prepare his defense." How can it be said the defendant could prepare his defense when the State had a motion to amend the information to change the date to May 16, 1991 (T-3 12) before the

trial court which the court had taken under advisement and the first indication the defendant had that the State would not proceed with its motion was when officer Meacham took the witness stand.

## CONCLUSION

"While it is true that no precise definition of the phrase 'due process of law' can be given, the courts have frequently defined the phrase in general terms. It has been said that due process of law must be understood to mean law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights." (See 16A Am Jur 2d Constitutional Law §808, p. 960.)

The defendant came to the First Circuit Court of the State of Utah expecting to be accorded due process of law. A couple of matters in this record and this appeal indicates that he did not feel he was given "law in the regular course of administration through courts of justice" (16A Am Jur 2d Constitutional Law, supra.)

At the first hearing in this matter he expressed his concern that the only witness in the case was also the bailiff and seemingly had access to the Court when the defendant was not present (T-3 4): "Mr. Dunbar says there is a problem . ." with James Mecham serving as bailiff. At the conclusion of the trial he expressed concern about the testimony of Mr. Meacham: " . but part of it is the outrage over the license being revoked or suspended due to an officer's perjury in the first place." (T-8 134)*

*See in the Appendix Officer Meacham's contradictory testimony that he had and did not have the driving records on May 17, 1991.

The defendant could reasonable conclude that he was not getting the fair hearing to which he was entitled by the Court's final comments to Mr. Dunbar:

> . . . you've been a real pain in the ass to a lot of people around here, you know that. You've done some things that you know you shouldn't have done (T-8 p. 137)

If that statement was not enough to indicate to the defendant that perhaps the system was working against him the Court went on to say:

> . . I feel sometimes like coming off the bench and hitting you on the head with a two-by-four to get your attention, but that wouldn't do any good. . (T-8 137).

The record in this case shows that the defendant's prior driving record (if we can accept Exhibit 1 as being the defendant's driving record), involved only a refusal to submit to a breath test and a subsequent driving under the influence conviction. It is respectfully submitted that such a record hardly requires the above comments of the Court unless the Court may have learned some additional information through the bailiff that is not part of the record. Under the possibility of that this may be the reason for the Court's comments, it is respectfully submitted that the Court of Appeals should carefully consider the questions raised in this appeal.

First there is the question of lack of a speedy trial solely because the bailiff, the complaining officer, James Meacham, did not follow the usual procedure in this case of stopping the defendant when he suspected he was driving on suspension and issuing him a

citation, but waiting nearly three weeks until he knew the defendant would be in court on another matter and serving him with a summons without filing the information or bringing it to the Court's attention and then not filing it until two days after the defendant was supposed to appear. Surely the Court of Appeals should not condone such unfair action on part of an officer of this state and as a bar to future officers who may want to cause an accused person a serious inconvenience, the Court of Appeals should dismiss this entire procedure as a violation of the defendant's rights to a speedy trial under the Utah and the United States Constitutions.

Second, if the Court of Appeals does not want to establish a precedent that errors of an officer should be grounds for denial of a speedy trial in absence of some effort of the defendant to exercise that right, then surely the unusual actions of Officer Meacham in this case failing to issue a citation to the defendant or even calling his attention to the fact the the officer had observed him driving, and then waiting three weeks until the defendant was in court on another matter and signing the information but failing to have it brought to the defendant's attention while he is in court and making sure that if he does appear the next day on the summons as he is supposed to do, making sure that no information is on file to which the defendant can enter a plea, then filing the information after the date the defendant is supposed to appear so that the Court can issue a bench warrant without a probable cause statement from the officer that would help the

defendant in preparing his defense warrants a finding that the defendant has been denied equal protection and due process of the law under the Utah and the United States Constitutions.

Third, if the Court of Appeal does not feel the unusual action of the officer is sufficient to discharge the defendant, then surely this is the time to clarify the jurisdiction of the Circuit Courts and Municipal Justice Courts when a traffic offense, a Class C Misdemeanor occurs partly within the territorial jurisdiction of the Municipal Court and partly within the territorial jurisdiction of the Circuit Court. It is respectfully submitted that the intent of the legislature seems clear that it is intended that when such occurs there should be no opportunity for judge shopping but all Class C Misdemeanor traffic offenses should be filed in the Municipal Justice Courts if they would have jurisdiction.

Fourth, it seems there is no question but that the lower court should be informed that it is improper to seat the jury in alphabetical order since the Rules of Criminal Procedure clearly require that the names chosen for the jury panel should be drawn by lot so that the Roe's have an equal chance to sit on a the jury as the Doe's.

Fifth, it is respectfully submitted that every defendant is entitled to have a jury that is impartial sit in judgment and if the jurors have some personal feelings that would make them think they would not like a juror in their same frame of mind to sit on their case, that juror should be excused. In this case all the prospective jurors except one felt they would not like a juror in the

same frame of mind as they were to sit on the case if they were the defendant.

Sixth, it is unfair to a defendant to come to court thinking that no evidence will be presented that he drove in River Heights and then have the State of Utah elicit that evidence from the witness in violation of a direct court order.

Seventh, where the statutes regarding driver's licenses are ambiguous to say the least and it is clear that if Exhibit 1 referred to the driving record of the defendant he was entitled to a directed verdict as the evidence showed his license had expired after it was suspended.

Eighth, it was apparent from the record that if Exhibit 1 did refer to the driving record of the defendant it showed that his driver's license had expired, and he was therefore entitled to have the jury determine the factual situation of whether he was driving with an expired driver's license or one that was still in effect but temporarily suspended, as he was entitled to have the lesser offense submitted to the jury as an alternative verdict.

Ninth, a defendant is always concerned when a juror hears a conversation regarding the case outside of the court room, and no amount of testimony will ever convince the losing defendant that something improper was not said. This was especially significant in this case as there may be some question as to the juror's impartiality because of evidence which arose after the time had expired for filing a motion for new trial. The defendant should be

given a new trial to be sure that he received a verdict from a jury in which all members were impartial and did not receive evidence outside of the court room.

Tenth, the defendant realizes that he must martial all the evidence which supports the jury's verdict where he asks for a reversal by the Court of Appeal, but there is simply not one statement in the entire record that the driving record of Don W. Dunbar named in Exhibit 1 is the same Don W. Dunbar named as defendant in this case. It is respectfully submitted that the Court of Appeals should not allow prosecutor's to get sloppy and omit essential testimony even where the case involves a small matter, a Class C Misdemeanor, as it is at this stage the great majority of the citizens of this state get their understanding of the importance of having a government of laws and not a government of men who may assume facts not in evidence because they assume common sense tells them they are doing the right thing. Allowing sloppy procedure will eventually result in the innocent being convicted and that is most certainly contrary to the laws and constitutions of this state and the United States of America.

Eleventh, the Court of Appeals should use this case to instruct trial judges that the lay person in court may see things a little differently and allowing a person to serve as bailiff with access to the judge where the bailiff is the only witness does not present an appearance of fairness regardless of whether or not any prejudice resulted.

Twelfth, the trial court cannot use the procedure of taking

motions under advisement where substantial rights of a defendant are involved such as the right to know the precise date on which the alleged offense occurred. The defendant views this as a serious breach of his right to a fair trial and he fully intends to find an alibi witness for the May 17, 1991 date if the Court of Appeal grants him a new trial as it should do where the actions of the trial court seriously interfered with his opportunity to adequately prepare for trial.

In view of the many errors, it is respectfully submitted that the Utah Court of Appeals should reverse the decision of the trial court and discharge the defendant or at the very least remand the case for a trial using correct and fair procedures which will assure the defendant of having a trial governed by the same rules as are applied to all defendants and a fair opportunity to defend himself.

RESPECTFULLY SUBMITTED this 10th day of July, 1992.

Ted S. Perry
Attorney for Defendant and
Appellant

## APPENDIX

Under the rule requiring the appellant to martial all the evidence which sustains the verdict where the appellant claims the trial court erred in not granting a motion for a directed verdict, the following is presented as all the evidence in the record from which the jury could find that the Don W. Dunbar named in Exhibit 1 was the same person as is named as the defendant in this action: Under direct examination of James Meacham by the State the following appears:

Q. After you observed the defendant driving this motor vehicle, did you then make a determination, through the State of Utah, as to whether he possessed a valid driver's license in the State of Utah?

MR. PERRY: Just a moment, your Honor. I think the evidence of what the status of his license was will be contained in the report, not what his personal observation is, and I think his personal observation is hearsay.

THE COURT: I'll sustain the objection. It's my understanding that there has been a stipulation that the certified driving record can be received. (T-8 58)

Is that correct Counsel?

MR. PERRY: That's correct, your Honor.

THE COURT: All right. If that could be marked then and that will be admitted as an exhibit. And I'll direct that the jury may consider that as proven because there has been a stipulation; in other words, the exhibit will be available for you and admitted as evidence.

Q. (By Mr. Preston) Showing you what has been marked for identification as Plaintiff'd Exhibit--

MR. PRESTON: Well, at this time, I'd offer into evidence Plaintiff's Exhibit 1, Counsel.

MR. PERRY: No objection, your Honor.

THE COURT: Plaintiff's Exhibit 1 is admitted.

Q. (By Mr. Preston) Show you what has been marked for identification as Plaintiff's Exhibit 1. Just for purposes of identification, the--the top sheet on that is a certification by the records officer, is it not?

A. Yes, sir.

Q. And the second page down is--is a printout from a--

MR. PERRY: Well, your Honor, I don't know that the jury needs an explanation of what the exhibit is. They can read. And I think we don't need further comment by counsel or the witness as to what is says. (T-8 59)

THE COURT: The best--the best evidence, it would seem would be the document itself. You may ask questions about whether or not he has taken action on it or something, but I think the best evidence would be the document itself.

Where are we going with this?

MR.PRESTON: Let me ask--well, let me ask this question then.

Q. (By Mr. Preston) Did--have you seen a copy of that prior to this time?

A. Yes. I have.

Q. After you saw Don Dunbar driving, did you obtain a copy of that, or other duplicate copies of that document?

A. Yes, sir. I made the request for the--

MR. PERRY: I think the question can be answered yes or no.

THE WITNESS: Yes.

Q. (By Mr. Preston) As a result of that, did you make a determination as to whether or not he had in fact committed a criminal offense in your presence?

A. Yes.

Q. And that offense was what?

MR. PERRY: Well, just a minute. I think the document speaks for itself and now he's invading the province of the jury.

THE COURT Well-- (T-8 60)

MR. PRESTON: Well, I think--

THE COURT: --if you'll rephrase that question, I'll allow it, but--

Q. (By Mr. Preston) Let me put it this way: As a result of reading that document, did you then sign an Information charging Don Dunbar with driving during suspension?

A. Yes.* I did. (T-8 61) . . .

Q. (By Mr. Preston) Had you at that time--did you at that time, have the documentation from the State of Utah evidencing the fact that he was on suspension?

A. Yes. I was already--

MR. PERRY: Objection, your Honor. I think-- (T-8 73)

THE COURT: I'll sustain the objection as to the characterization of the documents; however, you may rephrase the question.

Q. (By Mr. Preston) Did you have any personal knowledge of whether or not the defendant did or did not have a driver's license at that time?

MR. PERRY: Well, just a moment, your Honor. He can ask the question when he received the documents from the State of Utah. The question the Court struck out is what it said, and that's what I objected to. Now personal knowledge obviously doesn't--

THE COURT: Sustain--sustain the objection. You may rephrase the question.

Q. (By Mr. Preston) Exhibit--where is the exhibit?

A. Right here.

Q. Exhibit 1 is dated--Exhibit 1 is dated by the State of Utah, on June 10th; is that correct?

A June 10th, 1991.

*Note Officer Meacham testifies he read Exhibit 1 on June 3 when he signed the Information even though Exhibit 1 was not prepared until June 10th.

Q. So, therefore, that document was not in your possession at that time? On the 17th of May?

A. This certified copy was not, that is correct. (T-8 74)

## CERTIFICATE OF SERVICE

I, Ted S. Perry, certify that on July 10th, 1992 I served four copies of the attached appellant's brief upon Attorney George W. Preston, counsel for the appellee in this matter, by mailing four copies to him by first class mail with sufficient postage prepaid to the following address:

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Ted S. Perry
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